Supreme Court, U.S.
FILED

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No. 95-511

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LISA B. WILLIAMS,
Petitioner,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
Respondent,

and

OFFICE OF SPECIAL COUNSEL; GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Whether the Court of Appeals erred in concluding that petitioner, a non-supervisory state employee, was a "covered employee" for purposes of the "Hatch Act".**

II. **Whether the Court of Appeals interpretation of the "Hatch Act" treating petitioner as a covered employee violated her first amendment right to free speech and political participation.**

III. **Whether under the circumstance of this case it is unconstitutional to apply the "Hatch Act" to petitioner.**

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

LISA B. WILLIAMS

U.S. MERIT SYSTEMS PROTECTION BOARD

OFFICE OF SPECIAL COUNSEL; GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW	ii
TABLE OF CONTENTS	ii
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	5

I. 5

The reported decision of the Court of Appeal is fundamentally unsound because it interprets the Hatch Act in a manner that makes virtually any state employee working in an agency that receives any federal funding subject to discharge at the discretion of the Merit Systems Protection Board if they participate in partisan political activity.

II. 8

The Court of Appeals failed to balance the important constitutional right to political participation against the public interest in regulating political conduct as required by the Constitution.

III. 10

The decision of the Court of Appeals addresses questions that have never been decided by this Court and have potentially far reaching consequences for State citizens who desire to participate in State partisan political activity without being subject to unreasonable Federal scrutiny.

CONCLUSION 11

APPENDIX A-1

Opinion of the U.S. Court of Appeals for the Fourth Circuit 55 F.3d 917 (1995) A-1

Administrative Recommended Decision of the Merit Systems Protection Board (Edward J. Reidy) A-13

Administrative Order and Opinion of the Merit Systems Protection Board A-27

Opinion of the United States District Court for the District of Maryland (Hon. Marvin J. Garbis) A-32

U.S. Court of Appeals for the Fourth Circuit Order Denying Petition for Rehearing with Suggestion for Rehearing In Banc A-45

STATUTES A-47

TABLE OF AUTHORITIES

Page

Cases Cited

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 11

Bullock v. Carter,
405 U.S. 134 (1972) 11

Gregory v. Ashcroft,
501 U.S. 452, 458, 111 S.Ct. 2395 (1991) 7

Waters v. Churchill,
114 S.Ct. 1878, 1885 (1994) 9

McIntyre v. Ohio Election Commission,
___U.S.___, 115 S.Ct. 1511 (1995) 9

Williams v. U.S. Merit Systems Protection Board,
55 F.3d 917 (4th Cir. 1995) 1,11

McLaughlin v. Florida,
379 U.S. 184, 191 (1964) 11

United States v. Alfonzo,
___U.S.___, 115 S.Ct. 1624 (1995) 7,10

U.S. Civil Service Commission v. Letter Carriers,
413 U.S. 540 (1973) 11

STATUTES

5 U.S.C. 1502(a)(3) 3

5 U.S.C. 1506(a)(2) 6

Art. I § 8 U.S. Const. 10

Amendment I, U.S. Const. 10

Amendment X, U.S. Const. 10

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein, Lisa B. Williams prays this court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this Case.

OPINIONS BELOW

The Decision of the U.S. Court of Appeals for the Fourth Circuit was reported at 55 F.3d 917 (4th.Cir. 1995) as set forth below. The decisions of the United States District Court for the District of Maryland, Civil Action No. MJG-93-514, the Honorable Marvin J. Garbis presiding and the Recommended Decision and Final Decision of the Merit Systems Protection Board Docket No. CB1216126009T1 are set forth below.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Judgment of the U.S. Court of Appeals for the Fourth Circuit by Writ of Certiorari pursuant to 5 U.S.C. § 1508. The Court of Appeals denied Petitioner's motion for rehearing on June 29,1995.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 1501-1508
Amendment I, United States Constitution
Amendment X, United States Constitution

STATEMENT OF THE CASE

The Merit Systems Protection Board affirmed the Decision of the Administrative Law Judge, Edward J. Reidy, finding that Petitioner, a Maryland State employee in the Governor's Office for Individuals with disabilities had violated 5 U.S.C. § 1502(a)(3) of the Hatch Act. App. 13-31. That State agency received some federal funds. The Hatch Act provision prohibits employees whose principal employment is in connection with an activity financed by federal funds from being a candidate for elective office in a partisan election. Although Petitioner had taken a leave of absence from her job during the campaign and had sought advice as to whether her candidacy would jeopardize her employment from state officials, the Board ordered that she be removed from her state employment. App. 28-31. On February 16, 1994 the U.S. District Court for Maryland reversed the Board's decision concluding that Petitioner was not a covered employee. App. 32-42. In its decision the court noted that the interpretation rendering Petitioner a covered employee urged by the Board "has virtually no ascertainable limitation..." App. 37. The District Court noted that although Petitioner signed some financial documents at her supervisor's direction and only during her supervisor's occasional absence. She neither "had nor exercised any discretionary or supervisory authority in connection with the use of federal funds." App. 40.

The Circuit Court reversed the District Court's decision concluding that a Hatch Act violation need not involve an employee who has discretionary authority over federal funds. App. 1-12. It reached this conclusion despite its own characterization of Petitioner as having "...the mitigation of a clean employment record..." App. 11. The Board has never

suggested that Petitioner's job performance or conduct during her political activity ever effected her employment responsibilities, her agency, or her co-workers.

At the administrative hearing, the Government argued that Petitioner had a position of authority at OID and played a role in the disbursement of funds. The Special Counsel stated that its case would establish that Petitioner "is considered and acts as senior management."

It called Marian Vessels as its witness. She was the Executive Director of the office for which Petitioner was executive assistant until January 1991. She noted that Petitioner would have occasion to sign certain office payment vouchers. This authority to sign vouchers was occasionally delegated to Petitioner during occasional periods of Ms. Vessel's extended absence or vacation. Petitioner would also have on occasion signed office timesheets and some reports in Vessel's absence. *See,* App. 22-23.

Vessels described Petitioner's office duties as legislative, informational or referral. Petitioner would attend meetings when Vessels could not attend, review legislation regarding disabled citizens, prepare press releases and annual reports.

Gertrude Jeffers was Director of OID during the time period relevant to these proceedings up to April 1990, just prior to the tenure of Marian Vessels. Jeffers hired Petitioner in April 1987. She testified that when she was on vacation (extended absence) she designated Petitioner to sign certain documents and correspondence on her behalf.

Jeffers' testimony could not establish that Petitioner was ever aware or had knowledge of the billing codes on the

invoices she allegedly had the authority to review or decline. Jeffers further admitted that Petitioner's job description contained no fiscal responsibility, no budgetary oversight and there was no evidence whatsoever that she ever declined the payment of a voucher she was asked to authorize while Jeffers was absent from the Office.

Mary Brady was Executive Director of the federally funded program known as the "Technology Assistance Program" (TAP). She testified that on one occasion Petitioner provided information on legislative activity to her program. This would involve providing Brady with a list of bills relevant to her program that might be pending in the State Legislature. Ms. Brady described her professional relationship with Petitioner as strictly "collegial" and confirmed that Petitioner had no involvement in the administration or management of TAP including the budget process. Brady believed the Petitioner had no authority to sign off on any documentation for the TAP program. *See,* App. 40-41.

Henry Raymond, Deputy State Financial Administrator, was called as a witness by the Special Counsel. He testified regarding the agency fiscal process. He stated that generally, an Executive Director must sign a bill. He stated that if a bill was processed with Petitioner's signature, it meant that the Director must be on vacation. Raymond stated the Petitioner had no fiscal role in the office. *See* App.40-41. Further facts will provide as necessary in the reasons for granting the writ which follows.

REASONS FOR GRANTING THE WRIT

I. The reported decision of the Court of Appeals is fundamentally unsound because it interprets the Hatch Act

in a manner that makes virtually any state employee working in an agency that receives any federal funding subject to discharge at the discretion of the Merit Systems Protection Board if they participate in partisan political activity.

The Court of Appeals issued an opinion joined by Judges Russell, Wilkenson, and Williams, reversing and remanding the Order of the District Court for Maryland, the Honorable Judge Marvin J. Garbis, presiding. The decision struck down an order of the Merit Systems Protection Board requiring that Lisa B. Williams be removed from her State employment because of an alleged "Hatch Act" violation (5 U.S.C. § 1501-1508 (1988)). The violation alleged was that she was a candidate in an unsuccessful 1990 election campaign for the Maryland House of Delegates while employed in an agency that received some funds from the Federal Government.

It had never been alleged that Ms. Williams' conduct during her campaign or as an employee ever directly or indirectly had an adverse effect on the proper administration of those funds. Indeed, the Court of Appeals recognized that her work record was without blemish. Notwithstanding the lack of abuse or any allegation of harm to the Federal Government, the Court of Appeals found that Petitioner was a covered employee and affirmed the Merit Systems Protection Board Order that she be removed from her State employment without pay. If the State of Maryland does not choose to comply with that Order, it would be required to forfeit an amount equal to two years of her salary pursuant to 5 U.S.C. § 1506(a)(2) (1988). Further, Ms. Williams could not be rehired by any other State or local agency for (18) months without the State being required to forfeit a portion of the equivalent of two years of Ms. Williams' salary.

The broad interpretation in this decision to the power of congress to enforce the Hatch Act provisions against State citizens who wish to participate in the political process has potentially unsettling consequences. The decision upholding the harsh and arguably punitive sanction of discharge against Ms. Williams should be reviewed. Although federal congressional power to control States and their citizens is broad, it is not without limits. As this Court recently reminds us in the April 26, 1995 decision in *United States v. Alfonzo Lopez,* ___ U.S. ___, 115 S.Ct. 1624 (1995):

> We start with first principals. The Constitution creates a Federal Government of enumerated powers. See U.S. Const. Art. I. Sect. 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal governments are numerous and indefinite. "The Federalist No. 45. pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft,* 501 U.S. 452, 458, 115 L.Ed. 2d 410, 111 S.Ct. 2395 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez, supra,* 115 S.Ct. at 1626.

Although the *Lopez* case was a discussion of the Commerce power in particular, it's reasoning is equally applicable to statutes intended to limit the rights of State citizens intending to exercise their political freedoms without

unreasonable congressional interference.

In *Lopez* the Court rejected the government's argument that congress could regulate activity based simply upon a theory of the nation's general "economic well-being" or "internal productivity." The Chief Justice reasoned that:

> We pause to consider the implications of the Government's arguments. The Government admits, under it's "costs of crime" reasoning, the Congress could regulate not only all violent crimes, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity that Congress is without power to regulate. *Lopez, supra*, 115 S.Ct. at 1632.

This Court should examine the Fourth Circuit's broad construction of the definition of "covered employee" under the Hatch Act to assist in the predictable and consistant interpretation of the federal law which affects many state workers in every jurisdiction of the United States.

II. The Court of Appeals failed to balance the important constitutional right to political participation

against the public interest in regulating political conduct as required by the Constitution.

Petitioner's constitutional claims were summarily rejected by the Court of Appeals. In doing so the Court ignored its obligation to consider constitutional rights that Petitioner has not forfeited simply by virtue of her public employment.

This Court has recognized that the right to private political participation is an important interest. *See McIntyre v. Ohio Election Commission,* ____ U.S. ____, 115 S.Ct. 1511 (1995) (recognizing the constitutional right to hand out anonymous literature on a political issue despite a State law requiring disclosure of the identity of the sponsor of the leaflet).

The Court of Appeals failed to engage in any balancing of the interest of Congress in regulating the conduct of a State employee who was delegated minimal, if any discretion over federal funds. The Supreme Court has required such a balancing take place when the employee's interest in public speech or political participation is present. "[T]he First Amendment creates a strong presumption against punishing protected speech even indirectly..." *Waters v. Churchill,* 114 S.Ct. 1878, 1885 (1994). "[A] Government employee, like any citizen may have a strong legitimate interest in speaking out on public matters. In such situations the Government may have to make a substantial showing that the speech is, in fact likely to be disruptive before it may be punished." *Id.* 114 S. T. at 1887. Similarly, Ms. Williams was punished for choosing to seek elective office without any showing by the government of the need to prevent her participation. The failure of the Fourth Circuit to engage in any balancing before rejecting Petitioner's constitutional claim warrants this Court's review.

III. The decision of the Court of Appeals addresses questions that have never been decided by this Court and have potentially far reaching consequences for state citizens who desire to participate in state partisan political activity without being subject to unreasonable Federal scrutiny.

In so far as Petitioner has been able to determine, this Court has never decided the question of what constitutes a "covered employee" for Hatch Act purposes. It has never addressed whether a construction of these persons subject to Hatch could be so broad as to violate the First Amendment, equal protection of the law (between Federal and State employees) or the fundamental principals of Federalism. In essence, the Hatch Act places qualifications on who may participate in State elections. An act of Congress which reaches into such an important area of State government should be subject to the adequate constitutional scrutiny. If Congress cannot regulate all State political participation, it cannot force the States to comply with every limitation on State political candidates. It must be the case that a Petitioner like Ms. Williams who is arguably beyond the reach of the Hatch Act is protected by the Tenth Amendment of the U.S. Constitution as well. ("The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or the people.") As this Court has recently said Congress has no "plenary police power that would authorize enactment of every type of legislation." *See, U.S. v. Lopez, supra,* 115 S.Ct. at 1633 (citing Art. I, § 8 U.S. Constitution).

Indeed, even the question of sanction against Petitioner leads to an illogical and ironic result. If she were a Federal

employee sanctions other than dismissal would be available to her. *See,* 5 U.S.C. § 1506. Since she is a State employee she must be removed or the State must forfeit receipt of Federal funds in an amount equal to the employee's pay over two years. *See, Williams,* 55 F.3d at 922. Further, she may not be rehired by the State for eighteen months. Such severe sanctions should be supported by a rational basis and any difference in treatment between how Federal and State employees are sanctioned should be adequately justified. Such differences in treatment created by a statute singling out a group must have a rational basis which is "reasonable in light of its purposes..." *McLaughlin v. Florida,* 379 U.S. 184, 191 (1964).

Although Petitioner recognizes that the right to engage in political activity is not absolute, *United States Civil Service Commission v. Letter Carriers,* 413 U.S. 548, 567 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973), it cannot be disputed that the right to participate in an election for public office is an important constitutional right. *See, Bullock v. Carter,* 405 U.S. 134 (1972). The important issues raised by this Case should be resolved by this Court since a determination of who can constitutionally be treated as a "covered employee" for Hatch Act purposes should not be left to uncertainty of lower court determinations without some uniform guidance. Review is especially desirable and in the public interest since Federal aid to the States and State partisan elections will both continue to be the practice in this country.

CONCLUSION

For the above stated reasons, Petitioner, Lisa B. Williams, respectfully requests that this Court issue a Writ of Certiorari

to the United States Court of Appeals for the Fourth Circuit on all three questions presented.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

LISA B. WILLIAMS

PLAINTIFF-APPELLEE

v.

U.S. MERIT SYSTEMS PROTECTION BOARD

DEFENDANT-APPELLANT

and

OFFICE OF SPECIAL COUNSEL; GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES

DEFENDANTS

No. 94-1526

55 F.3d 917

Argued March 9, 1995

Decided May 3, 1995

As Amended June 9, 1995

Motion for Rehearing Denied June 29, 1995

ARGUED: Sherry Ann Armstrong, General Attorney, Merit Systems Protection Board, Washington, DC, for appellant. Alfred Nance, Baltimore, MD, for appellee.

ON BRIEF: Mary L. McCord Jennings, Deputy General Counsel and David C. Kane, Assistant General Counsel, Merit Systems Protection Board, Washington, DC, for appellant.

JUDGES: Before RUSSELL, WILKINSON, and WILLIAMS, Circuit Judges.

Reversed and remanded by published PER CURIAM opinion.

OPINION

PER CURIAM: The United States Merit Systems Protection Board (MSPB or the Board) appeals the district court's finding that Lisa B. Williams, a state employee, was not subject to the Hatch Political Activity Act (Hatch Act), 5 U.S.C. §§ 1501-1508 (1988). Because we find that Williams was a "covered employee" subject to the proscriptions of the Act, we reverse the district court's narrow interpretation of the Act and remand for further proceedings.

I.

Between 1987 and 1994, Williams worked as Executive Assistant to the Director of the Governor's Office of Individuals with Disabilities (OID), an executive agency of the

State of Maryland.[1] OID is a state-funded agency that administers several state programs, including the federally-funded Developmental Disabilities Council (DDC). During Williams' employment at OID, the time sheets, bills federal invoices, and other expenditures of the DDC program were channelled through the OID where they were consolidated and "signed off" by the OID Director before being forwarded for payment to the State Financial Administration Office. Williams was authorized to sign the DDC financial status reports in the Director's absence and did so on several occasions.

In 1990, Williams ran as a partisan candidate for public office. In response, the Office of Special Counsel (OSC or Special counsel) for the MSPB sent Williams three different letters informing her that she was subject to the Hatch Act. These letters told Williams that running as a partisan candidate for public office would violate the Hatch Act and could result in her removal from employment at OID. Williams disagreed with the OSC and continued her ultimately unsuccessful run for office.

In February of 1992, the MSPB charged her with violating the Hatch Act. After a hearing before an administrative law judge (ALJ), the ALJ found that Williams was a covered employee subject to the Hatch Act because she signed invoices

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[1] The state agency employing Williams was originally entitled the Governor's Office of Handicapped Individuals.

authorizing payment of federal funds. The ALJ further found that Williams violated the Hatch Act by running for office and that her violation was sufficient to warrant her removal from state employment. The MSPB adopted the ALJ's decision and ordered the OID to remove Williams from her employment at OID. On appeal from the administrative decision, the district court reversed and remanded, finding that Williams was not a "covered employee" because she did not exercise "discretionary or supervisory authority" over the use of federal funds.[2] The MSPB appeals.

II.

A.

The MSPB is the federal agency charged with enforcement of the Hatch Act. 5 U.S.C. § 1505 (1988). "The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship." *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143, 67 S.Ct. 544, 553, 91 L.Ed. 794 (1947). Decisions of the MSPB must be "in accordance with law" and are reviewed for abuse of discretion based on the administrative record; thus, the district

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[2] The district court also granted a preliminary injunction staying the MSPB order directing Williams' removal from state employment. We reversed that stay in an interlocutory appeal of the district court's order. *Williams v. United States Merit Sys. Protection Bd.*, 15 F.3d 46, 49 (4th Cir. 1994).

court's decision enjoys a presumption of correctness.[3] 5 U.S.C. § 1508 (1988); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. at 145-46, 67 S.Ct. at 554-55; *Minnesota Dept. of Jobs and Training v. Merit Sys. Protection Bd.*, 875 F.2d 179, 182 (8th Cir. 1989).

The issue before us is whether Williams was subject to the Hatch Act.[4] An "employee of a state agency is subject to the Hatch Act if, as a normal and foreseeable incident to [her] principal position or job, [she] performs duties in connection with an activity financed in whole or part by federal funds." *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990); 5 U.S.C. § 1501(4). The Act does not cover state employees whose connection with federally-funded activities is "merely a casual or accidental occurrence" of employment, *In re*

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[3] Decisions of the Board reported in the Merit Systems Protection Board Reporter, M.S.P.R., are not binding authority on this court, but may be relied upon for their persuasive authority.

[4] Section 1501 of the Hatch Act defines a "State or local officer or employee" as

> an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include--
> (A) an individual who exercises no functions in connection with that activity.

5 U.S.C. § 1501(4) (1988).

Brown, 3 P.A.R. 273, 300 (1974),[5] because such a *de minimis* connection does not justify application of the Act.

Partisan candidacy by a covered employee, however, is a *per se* violation of the Hatch Act. *Special Counsel v. Brondyk*, 42 M.S.P.R. 333, 337 (1989); 5 U.S.C. § 1502(a)(3) (1988). Williams does not dispute that, if she were subject to the Act, her candidacy would be a violation. However, she contends that she was not a covered employee under the Act.

Williams argues that the district court correctly determined that the Hatch Act only covers state employees who exercise supervisory or discretionary authority over the administration of federal funds. She contends that she did not exercise administrative or executive discretion over the use of federal funds because she merely "rubber-stamped" approval of invoices and payment request forms on the rare occasions when the Director of OID was absent. Thus, she argues the district court was correct in determining that any discretionary authority she may have exercised was *de minimis* and did not warrant a finding that she was covered under the Act. We disagree with the district court's interpretation, however, and believe that the plain language of the Act compels reversal.

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[5] The Political Action Reporter reports decisions of the United State Civil Service Commission, the predecessor of the MSPB. As with decisions of the Board reported in the Merit Systems Protection Board Reporter, the decisions reported in the Political Action Reporter are not binding authority on this court but may be relied upon for their persuasive authority.

The district court went beyond the plain language of the Act, and the decisions interpreting that language, when it determined that the actual exercise of supervisory or discretionary control over federally-funded activity was the requisite connection necessary for Williams to be subject to the Act.[6] This narrow interpretation of the scope of the Hatch Act has not been expressed in any published decision nor has it been adopted by the MSPB, the agency charged with enforcement of the Act. In reaching its conclusion, the district court relied on *Special Counsel v. Carter,* 45 M.S.P.R. 447 (1990), in which the ALJ, in his discussions whether Carter's "principal employment" under the Act was as a state employee, noted that Carter, as Executive Director of a local housing authority, had "supervisory and significant responsibilities in administering programs receiving federal funds." 45 M.S.P.R. at 452 (ALJ's recommendation). However, neither *Carter* nor the other decisions relied upon by the district court, expressly state that the exercise of discretionary authority in connection with federally-funded activity is required to hold a state employee subject to the Hatch Act cases are fact specific and the mere fact that several state employees found in violation of the Act also held or exercised such discretionary authority does not indicate that the exercise of discretionary authority is a necessary

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[6] Because Williams had not actually exercised discretionary authority, such as by refusing to sign request forms or invoices from DDC, the district court concluded she was not covered by the Act, even though Williams, had signed forms authorizing DDC's use of federal funds.

requirement to being covered under the Act.

Williams' employment was "in connection with" federally-funded activities. There is no dispute that OID administered federal funds through its oversight of DDC, ever though DDC determined the actual use of the funds. Williams' duties in connection with the federally-funded activities of the DDC were normal and foreseeable incidents to her job as Executive Assistant to the Director of OID because she had placed a signature card on file indicating that she was authorized to approve expenditures in the Director's absence. Furthermore, the position description for her job indicated that she was expected to "assist the Director in the administration and management of" the OID, a state agency with authority to oversee the activities of the DDC, a federally-funded state agency. Thus, it was foreseeable that Williams' normal job duties included authorizing DDC expenditures in the Director's absence.

There is no dispute that Williams approved the use of DDC funds on several occasions, although most of her duties at OID were apart from federally-funded activities. Williams signed her own name to approve payment of numerous DDC invoices, expense accounts, and grant payment requests. This connection was sufficient to place Williams under the Act because it was a "normal and foreseeable incident to [her] principal position or job," *Gallagher,* 44 M.S.P.R. at 61, and was more than "merely a casual or accidental occurrence" of her employment, *In re Brown,* 3 P.A.R. at 300. Therefore, we believe the district court's finding that the infrequency of these authorizations indicated a *de minimis* connection is

simply not supported by the record or by the language of the Act. Sufficient evidence in the record supports the Board's conclusion that Williams' actions in connection with federally-funded activities were sufficient to subject her to the restrictions of the Hatch Act. *See Minnesota Dept. of Jobs and Training,* 875 F.2d at 182 (when "reasonable basis" exists for Board's conclusion, a reviewing court must "defer to that conclusion as being within the discretion of the Board").

For the above reasons, we find that the Board's determination that Williams was subject to the Hatch Act is in accordance with the law, and reverse the district court on this issue.[7]

B.

Having found that Williams violated the Hatch Act by running for public office as a partisan candidate while she was a state employee subject to the Act, we must determine

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[7] We reject Williams' argument that application of § 1502 of the Hatch Act, which prohibits covered state employees from running for partisan office, violates her First Amendment rights to free speech and has a chilling effect on her right to partisan political expression. "[T]he Supreme Court has consistently found that the Hatch Act is constitutional and does not violate the First Amendment." *Williams,* 15 F.3d at 49 (rejecting a similar argument under § 1508) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973)).

whether removal from employment was the appropriate penalty for that violation.[8] Williams contends that the Board abused its discretion in determining that removal was appropriate, and that she should be allowed to return to her position at OID.

Congress has determined that the only penalty for violation of § 1502 of the Hatch Act is removal.[9] 5 U.S.C. § 1505(2) (1988). The Board has discretion to determine whether removal, or no penalty at all, is warranted. *See Oklahoma v. United States Civil Serv. Comm'n,* 330 U.S. at 146, 67 S.Ct. at 555 (finding that the question whether to remove a state officer or employee as a penalty for violating the Hatch Act "is a matter of administrative discretion"). Whether removal is appropriate depends upon the seriousness of the violation, taken in consideration with all relevant mitigating and aggravating factors. *Brondyk,* 42 M.S.P.R. at 337; *Special Counsel v. Purnell,* 37 M.S.P.R. 184, 200 (1988), *aff'd sub*

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[8] The district court did not address whether Williams' removal was appropriate because it found that Williams was not subject to the Hatch Act, and in reversing the Board's decision it also reversed the penalty imposed by the Board. However, we may review the Board's decision for abuse of discretion based on the administrative record, and affirm that decision if it is "in accordance with law." 15 U.S.C. § 1508 (1988).

[9] When removal is ordered, the employing state agency may chose to remove the employee, or it may instead forfeit receipt of federal funds in an amount equal to the employee's pay over a two-year period. 5 U.S.C. § 1506(a) (1988).

nom. Fela v. United States Merit Sys. Protection Bd.,730 F.Supp. 799 (N.D. Ohio 1989).

"[C]andidacy for partisan political office is...one of the most conspicuous and unequivocal violations of the Hatch Act," usually warranting removal unless strong mitigating factors are shown. *Brondyk,* 42 M.S.P.R. at 337. The Board adopted the ALJ's determination that Williams' violation warranted removal because it was "serious and partisan in color," (J.A. 235), and because she ignored repeated warnings by the Special Counsel that her candidacy would violate the Hatch Act, which the ALJ also considered an aggravating factor. The Eighth Circuit has upheld a partisan candidate's removal from state employment when he also ignored similar repeated warnings that his candidacy would violate the Hatch Act. *Minnesota Dept. of Jobs and Training,* 875 F.2d at 183; *see also Brondyk,* 42 M.S.P.R. at 338-39 (removal because state employee violated Hatch Act by running for office despite two warnings by Special Counsel).

The Board agreed with the ALJ that the aggravating factors of Williams' offense outweighed any mitigating factors. Although Williams received advice from state officials that her candidacy would not violate the Act, the fact that she ignored repeated warnings to the contrary by Special Counsel offset that evidence. The serious and conspicuous nature of her violation, despite these repeated warnings, was sufficient to outweigh the mitigation of her clean employment record and the fact that she did not run again for public office while employed by the OID. Because the Board's decision to remove Williams from state employment was in accordance

with law, and because the Board did not abuse its discretion in reaching that decision based on a careful weighing of the mitigating and aggravating factors, we conclude that the Board acted properly in removing Williams from state employment. We therefore reverse the district court's decision and remand this case to the district court for entry of an order affirming the Board's decision.

III.

For the foregoing reasons, we reject the district court's determination that, in order to be subject to the Hatch Act, Williams had to exercise supervisory or discretionary authority in connection with the use of federal funds. Instead, we affirm the Board's determination that a state employee who approves the expenditures of a federally-funded state agency as a normal and foreseeable part of her employment has performed sufficient duties in connection with a federally-funded activity to be subject to the provisions of the Hatch Act. Finally, we affirm Williams' removal from state employment as a penalty for violating the Hatch Act. Accordingly, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

SPECIAL COUNSEL

PETITIONER

v.

LISA B. WILLIAMS

RESPONDENT

and

GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES

RESPONDENT

Docket No. CB1216920009T1
Date: August 24, 1992

COUNSEL: Lynn Alexander, Esquire and Shelly Remen, Esquire, Washington, DC, for petitioner. Alfred Nance, Esquire, Baltimore, Maryland, for respondent Williams. Jack

Schwartz, Esquire, Baltimore, Maryland, for respondent Governor's Office for Individuals with Disabilities.

BEFORE: EDWARD J. REIDY, Chief Administrative Law Judge

RECOMMENDED DECISION

INTRODUCTION

This proceeding is a Complaint For Disciplinary Action against respondents Lisa Williams individually and Governor's Office for Individuals with Disabilities nominally, filed February 19, 1992 by the Special Counsel (SC). Petitioner charges that Williams violated 5 U.S.C. § 1502(a)(3) (the Hatch Act) by becoming a candidate for public office in a partisan election. Asserting that Williams was employed by the State of Maryland in a position with an executive agency which received federal monies in the form of grants from the U.S. Department of Health and Human Services and the U.S. Department of Education, SC alleges she is covered by the prohibitions of the Act. SC also alleges that the violation is of the scope and effect to warrant her removal from employment with the State of Maryland under 5 U.S.C. § 1505.[1]

Oral hearing was held in Baltimore, Maryland, on May 28

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[1] Once a violation of the Hatch Act has been established there are only two alternatives: removal or no penalty. *Special Counsel v. Suso*, 26 M.S.P.R. 673, 679, n.11 (1985).

and 29 and June 3, 1992. All parties appeared and were represented. Post-hearing briefs have been filed. My recommendation is based upon the record as a whole.

THE STATUTE

The pertinent law, § 1502, provides:

(a) A state or local officer or employee may not-

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(3) be a candidate for elective office.[2]

The definition of "state or local officer or employee" is set out in 5 U.S.C. § 1501(4). It reads:

> an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency...

BACKGROUND

Lisa Williams has been employed by the State of Maryland

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[2] A nonpartisan candidate is excepted under 5 U.S.C. § 1502(a)(3). Respondent here was a candidate for the nomination of the Democratic party and for that reason was engaged in a partisan election. *Special Counsel v. Mahnke,* et al., MSPB Docket No. CB1216910004T1 (April 23, 1992).

since 1987. She was hired--and since then has been employed--as Executive Assistant to the Director of what was then the Governor's Office for Handicapped Individuals--now known by virtue of a name change as the Governor's Office for Individuals With Disabilities (OID). (Tr. 31-32.) While parts of this state agency are funded federally (*see* Ex. P-28), conflicting viewpoints over the role played by Williams in connection with those funds form a central issue in this complaint.

In June 1990 Williams filed with the State Administrative Board of Election Laws a Certificate of Candidacy for Nomination for Member of the House of Delegates for the purpose of having her name placed on the official ballot as a Democratic candidate in the primary election to be held on September 11, 1990. She later became a candidate in that election but was unsuccessful. (Exs. R-5, 7-10.)

Prior to launching her election effort, Williams had been given the impression from state officials that she was free to become a candidate. Still, she was cautioned to remain sensitive about any possible conflict of interest. (Exs. R-5-6.) The Office of Special Counsel, however, did not at all agree that she was free to run owing to the fact that her position as Executive Assistant had duties connected to federal funds. Moreover, once petitioner became aware of her planned candidacy, SC sent several warning letters to Williams explaining petitioner's opinion that the facts known would warrant a finding that she was in violation of the Hatch Act. These letters were sent between June and August of 1990 and cautioned Williams about the possible consequences of her

continued candidacy, namely, removal from her employment with the state. (Exs. P-29, 31, 33.) These caveats did not deter Williams from actively proceeding with her candidacy.

The Directorate--OID--functions as the administrative head of various programs. Among them are the Governor's Committee for the Employment of Persons with Disabilities (GCEPD), the Developmental Disabilities Counsel (DDC), and the Technology Assistance Program (TAP). Funding of these programs named varies. OID and GCEPD are funded by the state. DDC and TAP are federally funded. (Tr. 39, 41, 46, 114.) DDC receives all its funding from the United States Department of Health and Human Services (Tr. 215, 234-35), while TAP receives its funding from the U.S. Department of Education. (Tr. 215.) At that, OID is directly responsible for proper administration of federal grant awards. (Tr. 37, 40, 68, 108, 131; Ex. R-13.)

DDC is the organization within OID whose purpose is defined by the Federal Disabilities and Assistance Bill of Rights Act. (Tr. 411.) Federally funded, DDC is essentially self-contained. (Tr. 418-19.) However, federal DDC invoices, timesheets, bills and the like are funnelled through OID, there consolidated and forwarded for payment to the State Financial Administration Office. (Tr. 414.) OID always "signs off" on DDC's financial status report as mandated by federal law. (Tr. 129-31, 423; Ex. P-26.)

TAP similarly is a program within OID which is federally funded and under personnel and managerial control of OID in much the same manner as DDC. (Tr. 188, 199.)

BRIEFS

Petitioner, on brief, emphasis that the pivotal issue in this complaint is whether respondent is covered by the prohibitions of the Act. She contends jurisdiction over Williams is established in two respects. First, because Williams holds a position of considerable importance in an agency which derives more than half of its funding from the Federal Government. And for the added reason that, at times, Williams has been personally responsible for the administration and disbursement of federal funds within her agency.

Petitioner also maintains that the conspicuous violation shown warrants removal because respondent has not introduced any facts in mitigation.

In her Post-Hearing Brief respondent present the following generic arguments:

> (1) petitioner has not carrier her burden to show that respondent's principal employment is in connection with a federally-funded activity;
>
> (2) application of the Hatch Act to the factual predicate at hand is unconstitutional;[3] and

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[3] The Board has no authority to sustain challenges to the constitutionality of the Act. Still, sturdy and consistent precedent establishes the validity of this law. *See, e.g., Oklahoma v. United States*

(3) even if a violation is found, removal is not warranted.

She maintains that holding her covered by the Hatch Act would not satisfy the congressional intent underscoring its enactment, would serve no compelling interest and even deprives her of her right to participate in the election process.

Assuming that jurisdiction is nonetheless found, Williams maintains removal is not called for under the facts developed.

ANALYSIS

Petitioner carries the burden of showing, by the preponderant evidence, all the elements of the violation as charged. *Special Counsel v. Purnell,* 37 M.S.P.R. 184, 188 (1988), *aff'd sub nom. Fela v. U.S. Merit Systems Protection Bd.,* 730 F. Supp. 779 (N.D. Ohio 1989). This complaint turns on the question whether respondent was, during her candidacy in 1990, a covered employee for there is no dispute that Williams was a partisan candidate for elective office. I find SC has suitably carried her burden.

At the outset of this discussion, I emphasize, and find, that the source of her salary--be it state or federal--is not a relevant

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Civil Service Commission, 330 U.S. 127 (1947).

consideration. The controlling concept[4] is that:

> An officer or employee of a state or local agency is subject to the Act if, as a normal and foreseeable incident to her principal job or position, she performs duties in connection with an activity financed in whole or in part by federal loans or grants: otherwise she is not.

That respondent was employed by a state agency is not contested. As mentioned, respondent's job or position was with the State of Maryland where she carried the title of Executive Assistant in what is now OID. (*See* Ex. P-1.) A full-time position--this was her main or principal employment with the state. (Tr. 245.) The Department of Personnel of Maryland established a position description (PD) for that position while Williams encumbered it. (Ex. P-1.) And there is not indication that she had any other employment.

What is hotly contested is whether this employment "is in connection with an activity" federally financed. Central to respondent's defense is that she had no--or at least an insignificant--connection with federally-funded activities and therefore is not covered by this law.

A logical place to find out what duties Williams could be

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[4] As this Board explained in *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990).

expected to perform as Executive Assistant is in the PD for that role. The PD explains that it has been established to describe the major duties and responsibilities assigned to the Executive Assistant. Inasmuch as the PD delineates her actual and potential assignments within the organization I find it sets forth those duties which Williams can be expected to perform as "a normal and foreseeable incident to her principal job" as Executive Assistant.

With that, my analysis now turns to the question whether these delineated duties are "in connection with" an activity financed in whole or in part by federal loans or grants. Preponderant evidence shows that they are. In its general description of the duties and responsibilities of the Executive Assistant, the PD provides that employee's main purpose is:

> To assist the Director in administration and management of state mandated agency that exists to improve the quality of life for individuals who are disabled.

The PD then goes on to particularize some of those duties and responsibilities. Included ar the duties of the Executive Assistant to:

> ...Analyze, review and recommend state policies and procedures to determine compliance with applicable state and federal law.

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> ...Review proposed state and federal legislation to determine their impact on disabled citizens.
>
> ***
>
> ...Review state, local and private grant applications for compliance with federal and state law.
>
> ***

Not just that, but the incumbent of the position could be called upon to make decisions such as to:

> ...Determine if state policies and/or procedures comply with applicable state/federal mandates.

The PD goes on to explain that among the outside contacts required by the position are those dealing with "high level government officials at the local, state and federal levels." *Id.*

The aforementioned extracts from the PD under which Williams performed demonstrate that she simply could not perform her duties as Executive Assistant without in some way coming into direct contact with federally-funded activities. The PD itself establishes that, as part of her normal and foreseeable duties, her employment is in connection with activities federally funded.

This alone might well establish jurisdiction. Yet, there is more. Even though not all subprograms in OID are federally funded, two are--DDC and TAP. Both ar under the

administrative direction and control of the OID Director. Thus is the federal connection clear. Because the Executive Assistant is to assist the Director in the administration of this agency, I believe it logically and necessarily follows that the duties of the Executive Assistant also have the requisite connection. As Executive Assistant, the duties of Williams are clearly aligned to the general business affairs of her agency--OID. Hardly inconsequential, these duties include the obligation to perform in the absence of the Director. (Ex. P-16.) And, as this record shows, Williams has so acted.

Williams has signed invoices; Grant Payment Request forms; and time and attendance reports. (Tr. 67-74; 88-90, 96-98, 107.) I so doing she was authorizing the payment of federal funds. (Tr. 70, 75, 87, 93, 98.) She bears responsibility for the preparation of the OID Annual Report which includes the subprograms of DDC and TAP; she coordinates the agency Information and Referral Service; and even may be called upon to testify about OID. She prepares press releases and answers questions created by these releases. She even represented the Government and appeared on one occasion as the OID representative during budget review sessions with the Governor. (Tr. 112-23.) The conclusion that as a normal and foreseeable incident to her principal job she performs duties in connection with federally-financed activities is supported factually.

That Williams performed many--if indeed not the bulk--of her duties wholly apart from federal funds is not open to question. And were she to exercise no function in connection with federal funds, Williams would not be covered by the

Hatch Act. 5 U.S.C. § 1501(4)(A). Besides, were her federally-related functions--normal or foreseeable--found to be merely casual or accidental, there would be no coverage. What is more, there is no doubt that the federal connection is here shown is not as strong as where a supervisor with direct fiscal responsibility over federal funds is charged. Nevertheless, the Hatch Act's reach is long, long enough in my judgment to touch respondent Williams who, as the facts show, as a normal and foreseeable incident to her job as Executive Assistant, performs duties in connection with federally-funded activities. Upon consideration of the fact that respondent's officially defined duties have a federal hue, and relying on the concept that the Hatch Act is remedial in character, and is to be liberally construed, I find her duties are within the contemplation of the Act as in connection with an activity funded federally. The totality of her duties in connection with federally-funded activities are somewhat more than mere casual or perfunctory.

PENALTY: As mentioned, if any penalty for violating 5 U.S.C. § 1502(a) is to be imposed, it must be removal. Determination of whether removal is appropriate focuses on the state employee who violated the Hatch Act. Once a violation has been shown, the burden of producing evidence showing that the removal penalty is not warranted shifts to Williams. *Purnell,* 32 M.S.P.R. at 200.

Candidacy, as here, is a substantial and conspicuous infraction because it is a *per se* violation of the statute. *Special Counsel v. Brondyk,* 42 M.S.P.R. 333 (1989). Usually such a violation warrants removal unless there is a basis for

mitigation. *Id.* at 339. As noted in *Special Counsel v. Purnell, supra* at 200, the Board recognized that appropriate mitigation factors vary from case to case. Among the factors typically warranting consideration are: (a) the nature of the offense and the extent of the employee's participation; (b) the employee's motive and intent; (c) whether the employee has received advice of counsel regarding the activities in issue; (d) whether the employee had ceased the activities; (e) the employee's past employment record; and (f) the political coloring of the employee's activities.

The offense here is serious and partisan in color. Even though Williams did have some advice suggesting her candidacy was permissible, SC warned her on three separate occasions that she was covered by the law and was risking removal by continuing. That she chose to rely on erroneous advice does not preclude imposition of the penalty of removal. *Special Counsel v. Mahnke, et al.,* MSPB Docket No. CB1216910004T1 (April 23, 1992). This is a per se violation. Williams ignored warnings by the very agency authorized by Congress to issue authoritative advice about the Hatch Act. 5 U.S.C.A. § 1221(f); 5 C.F.R. § 1800.3. She forged ahead actively seeking election thereby aggravating her offense.

Williams has not run again. And I will accept the fact that there is no cloud on her past employment record. Still, these favorable factors hardly outweigh the offsetting considerations which warrant her removal. Her violation was serious, conspicuous and at odds with written warnings given by the very agency which oversees the Hatch Act. Mitigation has not been shown warranted: this violation is of such scope and

effect as to warrant removal. Her insistence that her candidacy was not an abuse of her state position is beside the point for it is not an element of proof in a Hatch Act complaint nor is the absence of actual harm to the State a matter for mitigation. *Special Counsel v. Winkleman,* 36 M.S.P.R. 71, 73 (1988).

FINDINGS: Upon consideration of the entire record I find that preponderant evidence establishes that Lisa B. Williams violated 5 U.S.C. § 1502(a)(3) as alleged, and that her violation was of such scope and effect as to warrant her removal from her position as Executive Assistant in the Governor's Office for Individuals with Disabilities with the State of Maryland.

The parties have 35 days after the date of service of this recommended decision to file any exceptions. Replies to exceptions are due within 25 days of the date of service of exceptions. Exceptions and replies should be filed with the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Suite 806, Washington, DC 20419. 5 C.F.R. § 1201.129(b)(c).

Edward J. Reidy
Chief Administrative Law Judge

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL

PETITIONER

v.

LISA B. WILLIAMS

RESPONDENT

and

GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES, STATE OF MARYLAND

RESPONDENT

Docket No. CB1216920009T1
Date: January 21, 1993

COUNSEL: Lynn Alexander, Esquire, Washington, DC, for petitioner. Alfred Nance, Esquire, Baltimore, Maryland, for respondent Lisa B. Williams. Jack Schwartz, Esquire, Baltimore, Maryland, for respondent Governor's Office for

Individuals with Disabilities, State of Maryland.

BEFORE: DANIEL R. LEVINSON, Chairman; ANTONIO C. AMADOR, Vice Chairman; JESSICA M. PARKS, Member

OPINION AND ORDER

This case is before the Board on a Recommended Decision dated August 24, 1992, issued by the Board's Chief Administrative Law Judge, Edward J. Reidy (CALJ). The decision was issued pursuant to an Office of Special Counsel complaint for disciplinary action against the respondents, Lisa B. Williams and the Governor's Office for Individuals with Disabilities (OID), Williams' employing agency and an executive agency of the State of Maryland. The complaint alleged that respondent Williams, employed by OID as an executive assistant, violated 5 U.S.C. § 1502(a)(3), the Hatch Political Activities Act (Hatch Act), when she was a candidate in a Democratic primary election for member in the Maryland House of Delegates on September 11, 1990.

The CALJ found that respondent Williams knowingly violated § 1502(a)(3) by her candidacy for partisan elective office. The CALJ also determined, in accordance with 5 U.S.C. § 1505, that the penalty of removal was warranted.

Respondent Williams filed exceptions to the Recommended Decision pursuant to 5 C.F.R. § 1201.129. These exceptions were essentially the same as the arguments presented to Judge

Reidy. In the first two arguments, Ms. Williams contended that she was not covered by the Hatch Act and that the penalty of removal was not warranted. We find that the CALJ adequately addressed these arguments and correctly found that Ms. Williams was covered by the Act and that removal was appropriate.

In her final argument, Ms. Williams contended that the application of the Hatch Act to her case violated the First Amendment. In response to this argument, the CALJ properly noted that the Board does not have authority to hold a statute unconstitutional and that the Supreme Court has found the Hatch Act constitutional. Recommended Decision at 6 n.3. Given the fact that the Hatch Act does not violate the Constitution, and given our findings that Ms. Williams is both covered by the Act and in violation of it, the application of the Act and in violation of it, the application of the Act to her cannot violate the First Amendment. *See U.S. Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 556 (1973).

Accordingly, we AFFIRM and ADOPT the Recommended Decision as Modified as the final decision of the Board and incorporate it herein.

The Governor's Office for Individuals with Disabilities is hereby ORDERED to remove Lisa B. Williams from her

position. 5 U.S.C. § 1505.[5] Pursuant to 5 U.S.C. § 1508, respondents are hereby notified of the right to file a petition for review in the United States district court for the district in which the respondents reside or do business within thirty days of the date of the mailing of this final decision.

The Special Counsel is ORDERED to notify the Board within 30 days of this final decision whether respondent Williams has been removed as ordered, unless this decision is stayed and respondent is suspended in accordance with 5 U.S.C. § 1508. It is FURTHER ORDERED that, after the first submission, the Special Counsel shall thereafter submit to the Board, at three six-month intervals, evidence that respondent has not been reemployed by any state or local agency in the State of Maryland for a period of 18 months, as provided in 5 U.S.C. § 1506.

This is the final decision and order of the Merit Systems Protection Board.

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[5] Pursuant to 5 U.S.C. § 1506(a)(1), if OID fails to remove respondent Williams within 30 days after the date of this Final Decision and Order, the Board shall order the appropriate Federal agency to withhold an amount equal to two years' pay for Ms. Williams from the loans and grants under OID's control. Thus, OID may choose to remove Ms. Williams or to forfeit receipt of Federal funds in an amount equal to two years of her pay. We further note that if Ms. Williams is rehired in a state or local agency in Maryland within 18 months after her removal, then the Board will order a withholding of federal funds in an amount equal to two years of Ms. Williams' salary. 5 U.S.C. § 1506(a)(2).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LISA B. WILLIAMS

PLAINTIFF

v.

U.S. MERIT SYSTEMS PROTECTION BOARD

DEFENDANT

Civil Action No. MJG-93-514

MEMORANDUM OF DECISION

The Court now has before it Plaintiff's Petition Requesting Review of an Opinion and Order Issued by the Merit Systems Protection Board on January 21, 1993, in the case of *Special Counsel v. Williams,* 56 M.S.P.B. 277 (1993). The Court has considered the legal memoranda submitted by the parties and has had the benefit of a hearing in coming to its decision.

I. BACKGROUND: Plaintiff Lisa Williams ("Williams") has been employed by the State of Maryland since 1987 as Executive Assistant to the Director of the Governor's Office

for Individuals with Disabilities ("OID"). This office was formerly known as the Governor's Office for Handicapped Individuals.

OID functions as the administrative head of various programs. Among them are the Governor's Committee for the Employment of Persons with Disabilities ("GCEPD"), the Developmental Disabilities Counsel ("DDC") and the Technology Assistance Program ("TAP"). OID and GCEPD are funded by the state. DDC and TAP are federally funded. DDC receive all its funding from the United States Department of Health and Human Services, while TAP receive its funding from the United States Department of Education.

Because it is federally funded, DDC is essentially self-contained. However, federal DDC invoices, timesheets, bills and the like are funneled through OID, there consolidated and forwarded for payment to the State Financial Administration Office. OID always "signs off" on DDC's financial status report as mandated by federal law. Similarly, TAP is a program within OID which is federally funded and under the control of OID in much the same manner as DDC.

In June 1990, Williams filed a Certificate of Candidacy for Nomination for Member of the House of Delegates with the State Administrative Board of Election Laws for the purpose of having her name placed on the official ballot as a Democratic candidate in the primary election to be held on September 11, 1990. She later became a candidate in that election but was unsuccessful.

Once the Office of the Special Counsel ("the Special Counsel") became aware of Williams' plans to run for office, it sent several warning letters to her explaining the Special Counsel's opinion that the facts known to it would warrant a finding that she was in violation of the Hatch Political Activities Act, 5 U.S.C. § 1501 *et seq.* (1988) ("the Act"). These letters were sent between June and August 1990 and cautioned Williams about the possible consequences of her continued candidacy, namely, removal from her employment with the state. Williams did not agree with the position taken by the Special Counsel and did not withdraw her candidacy.

In February 1992, the Special Counsel brought charges against Williams for violation of the Act and a complaint was filed with the MSPB. After a hearing before Chief Administrative Law Judge Edward J. Reidy ("the ALJ"), Williams was found to have violated § 1502(a)(3) of the Act. On January 21, 1993, the Merit Systems Protection Board ("MSPB") affirmed the ALJ's decision and ordered Williams removed from her position with OID. The MSPB directed the appropriate federal office to withhold from its grants to OID an amount equal to two years of Williams' salary pursuant to 5 U.S.C. § 1506(a)(2), if OID failed to remove Williams within thirty days of the order. In response to the MSPB's order, OID notified Williams that she would be removed effective February 19, 1993. On February 18, 1993, this court granted a preliminary injunction staying Williams' removal

from her state employment.[6] The matter now before the Court is Williams' petition seeking review of the MSPB's decision.

II. LEGAL STANDARD: When reviewing the MSPB's decision, this Court "shall review the entire record including questions of fact and questions of law." 5 U.S.C. § 1508. If the court finds that the decision is not in accordance with law, the statute provides that the court "shall remand the proceeding to the Commission with directions either to make a determination or order determined by the court to be lawful or to take such further proceedings as, in the opinion of the court, the law requires." *Id.*

III. DISCUSSION: There is no dispute that Williams participated in a partisan election, an activity from which "covered employees" are prohibited by the Act. *See* 5 U.S.C. § 1502(a)(3). The question presented in this case is whether Williams is a "covered employee" within the meaning of the Act. In resolving this question, the factual findings made by the MSPB will not be disturbed. However, the MSPB rulings on questions of law will be reviewed *de novo*.

The Act defines a covered "state of local officer or employee" as "an individual employed by a State or local agency whose principal employment is *in connection with* an

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[6] On January 24, 1994, the United States Court of Appeals for the Fourth Circuit decided to reverse this Court's stay and remand the case for further proceedings. *Williams v. MSPB*, ____ F.3d ____ (4th Cir. 1994). The Fourth Circuit action is not final as of this writing.

activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency..." 5 U.S.C. § 1501(4) (emphasis added). The MSPB has held that "[a]n officer or employee of a state or local agency is subject to the Act if, as a normal and foreseeable incident to her principal job or position, she performs duties in connection with an activity financed in whole or in part by federal loans or grants: otherwise she is not." *Special Counsel v. Gallagher,* 44 M.S.P.R. 57, 61 (1990).

The ALJ used Williams' position description ("PD") to determine what duties Williams could be expected to perform as a "normal and foreseeable incident to her principal job." Among her duties were analyzing, reviewing and recommending state policies and procedures to determine compliance with applicable state and federal law, reviewing proposed state and federal legislation to determine their impact on disable citizens and reviewing state, local and private grant applications for compliance with federal and state law. (ALJ Slip Op. at 8).

The ALJ then determined that Williams could not perform her duties without coming in direct contact with federally funded activities. He the delineated Williams' fiscal duties to support his determination. The ALJ cited evidence that Williams signed invoices, Grant Payment Request forms, and time and attendance reports from DDC and TAP. The ALJ admitted that the bulk of Williams' duties are wholly apart from federal funds and that the federal connection in Williams' case is not as strong as a supervisor with direct fiscal responsibility over federal funds. But he ultimately

concluded that the Act's reach extends long enough to cover Williams. (ALJ Slip Op. at 10).

The question presented by this petition is whether Williams' position description or any of her actual duties justifies her classification as a covered employee. The fundamental legal issue is the meaning of "in connection with" within the Act's definition of a "covered employee".

Definition of Covered Employee: As presented in it memorandum and argument, the MSPB advocates for a definition of "in connection with" which has virtually no ascertainable limitation of coverage. Assuming the Director of OID to be a "covered employee" because he writes memoranda directly affecting the use and distribution of federal funds, MSPB counsel could not articulate where, if at all, on a chain of remoteness would one reach an employee who was not covered. Hence, coverage is extended under the MSPB interpretation of "in connection with" to the director's secretary who types documents about federal funded activities, the messenger who takes the documents to the copying center, the copy center employee who make copies, the person who delivers the documents, etc. The MSPB concedes that perhaps, but only perhaps, an employee who unknowingly performed duties relating to a document concerning federally funded activities would not be covered. Although recognizing that there must be some point at which an employee's connection with the federally funded activities is too attenuated to warrant holding him or her within the "in connection with" category, MSPB counsel presented no suggested principled basis for defining that point.

It may be that the term "in connection with" theoretically is susceptible of a reading that would give it the virtually limitless reach suggested by the MSPB. However, to so read the term would not be sound statutory interpretation. The Court should seek to give meaning to every word in a statute. *See, e.g., In re Kitchin Equipment Co. of Virginia, Inc.*, 960 F.2d 1242, 1247 (4th Cir. 1992); *Welsh v. Century Products, Inc.*, 745 F.Supp. 313, 317 (D. Md. 1990). The MSPB's interpretation of "covered employee" is an irrational one. It leads to the result that state employees performing totally nondiscretionary activities which touch upon some document relating to the use of federal funds are covered employees. This is an absurd result. *See, e.g., Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1477 (10th Cir. 1990); *Commodity Futures Trading Comm'n v. P.I.E., Inc.*, 853 F.2d 721, 725 (9th Cir. 1988); *Smith v. Bowen*, 815 F.2d 1152, 1154 (7th Cir. 1987). It makes no sense whatsoever to interpret this term to mandate such broad coverage.

Although there is no definitive decision on point, the Supreme Court has stated that the "end sought by Congress through the Hatch Act is better public service by requiring those *who administer funds* for National needs to abstain from active political partisanship." *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 142 (1947) (emphasis added). Moreover, the published decisions of the MSPB demonstrate that, at least until the instant case, it has considered as "covered employees" those who exercise some discretionary and/or supervisory authority over the use of federal funds.

In *Special Counsel v. Gallagher*, 44 M.S.P.R. 57 (1990),

the covered employees included the Chairman of Board and Chief Executive Officer, Director of Administrative and Finance and Director of Operation and of Revenue Development of Transportation. In *Special Counsel v. Carter,* 44 M.S.P.R. 447 (1990), the court found the Executive Director of the Nashville Housing Authority covered by the Act. The Court found the covered employees to exercise "supervisory and significant responsibilities in administering programs receiving federal funds." 44 M.S.P.R. at 452. In so concluding, the court said that a cardinal concern of the Act is that the "distribution of public money...not [be] tainted by political influences." *Id.* And in *Special Counsel v. Martsteller,* 44 M.S.P.R. 111 (1990), an Assistant Comptroller was found to be a covered employee as he supervised staff which received and maintained financial and accounting records on all federal grants received by the agency. *See also, Special Counsel v. Dracup,*44 M.S.P.R. 107 (1990) (Comptroller of federally financed transportation authority), *Special Counsel v. Termini,* 44 M.S.P.R. 102 (1990) (Manager of Purchasing for transportation authority). In no case brought to the attention of this Court did the MSPB find there to be a "covered employee" unless the connection to federally funded activities was more than a mere casual, superficial connection.

The Court, consistent with the results (at least) of the MSPB decisions brought to its attention, interprets the Act to include as "covered employees" those whose duties have a connection with the use of federal funds by virtue of the employee's discretionary or supervisory authority and not by virtue of nondiscretionary ministerial actions or duties.

Was Williams Within the Definition?: The MSPB argues that even under this Court's view of the proper definition, Williams was a "covered employee." However, this Court does not find, in the MSPB factual findings, a basis for reaching the conclusion that she was a covered employee. Williams neither had not exercised any discretionary or supervisory authority in connection with the use of federal funds. The only references the ALJ makes to Williams' fiscal duties indicate her authority to act, but not the authority to exercise discretion in regard to her actions. The distinction is that between:

1. A supervisor's deciding to issue check 1, 2, 4, and 5 (but not 3) and directing and authorizing the subordinate to sign checks 1, 2, 4, and 5 (but not 3), and

2. A supervisor's giving a subordinate the discretionary authority to sign any or all of checks 1, 2, 3, 4, and 5.

Here, the evidence establishes that Williams has signed invoices, Grant Payment Request forms, and time and attendance reports. (*See,* Transcript at 67-74, 88-90, 96-88, 107). However, the evidence does not support a finding and there is no finding that she exercised any discretionary authority in signing these documents.

Moreover, even if it were permissible to conclude Williams did possess *some* discretionary authority with regard to federally funded activities, this was not a normal and foreseeable incident of her job as required by *Special Counsel*

v. Gallagher, 44 M.S.P.R. 57. The ALJ found that the bulk of Williams' duties were apart from federal funds. All the evidence from the record tends to show that Williams' fiscal responsibilities, if at all discretionary, were a small (if not negligible) part of her job. She undertook these duties only when the Director was out of the office on vacation, etc.--a very small part of each year. Given the *de minimis* nature and irregularity of such duties, they are not sufficient to warrant the conclusion that Williams was a "covered employee" under the Act.

IV. CONCLUSION: For the foregoing reasons:

1. The Court concludes that the January 21, 1993 Order of the Merit Systems Protection Board in *Special Counsel v. Williams,* 56 M.S.P.R. 277 (1993) should be reversed.

2. The parties shall submit a proposed Judgment Order or separate proposed Judgment Orders in accordance with this Memorandum of Decision by March 1, 1994.

    a. An agreement on the form of Judgment Order shall be without prejudice to the right of the Defendant to Appeal from the Judgment Order.

    b. In absence of an agreed Judgment, further proceedings shall be held as necessary prior to the entry of Judgment herein.

SO ORDERED this 16th day of February, 1994.

Marvin J. Garbis
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LISA B. WILLIAMS

PLAINTIFF

v.

U.S. MERIT SYSTEMS PROTECTION BOARD

DEFENDANT

Civil Action No. MJG-93-514

JUDGMENT

For reasons stated in its Memorandum of Decision issued February 16, 1994:

1. This Case is hereby REMANDED to the Merit Systems Protection Board.

2. The Merit Systems Protection Board shall reverse its decision in *Special Counsel v. Williams,* 56 M.S.P.R. 277 (1993) in accordance with the Memorandum of

Decision herein.

3. Plaintiff shall recover her costs from Defendant.

SO ORDERED this 9th day of March, 1994.

Marvin J. Garbis
United States District Judge

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

LISA B. WILLIAMS

PLAINTIFF-APPELLEE

v.

U.S. MERIT SYSTEMS PROTECTION BOARD

DEFENDANT-APPELLANT

and

OFFICE OF SPECIAL COUNSEL; GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES

DEFENDANTS

No. 94-1526

CA-93-514-MJG

Filed: June 29, 1995

On Petition for Rehearing with Suggestion
Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

Bert M. Montague

STATUTES

5 U.S.C.A. § 1501. Definitions

For the purpose of this chapter [5 USCS §§ 1501 et seq.]--

(1) "State" means a State or territory or possession of the United States;

(2) "State: or local agency means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

(3) "Federal agency" means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System; and

(4) "State or local officer or employee" means an individual employed by a State or local agency who principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency, but does not include--

(A) an individual who exercises no functions in connection with that activity;...

5 U.S.C.A. § 1502.

(a) A State or local officer or employee may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or

a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office.

5 U.S.C.A. § 1506.

(a) When the Merit Systems Protection Board finds--

(1) that a State or local officer or employee has not been removed from his office or employment within 30 days after notice of a determination by the Board that he has violated section 1502 of this title and that the violation warrants removal; or

(2) that the State or local officer or employee has been removed and has been appointed within 18 months after his removal to an office or employment in the same State in a State or local agency which does not receive loans or grants from a Federal agency;

the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants to the State or local agency to which notice was given an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation. When the State or local agency to which appointment within 18 months after removal has been made is one that receives loans or grants from a Federal agency, the Board order shall direct that the withholding be made from that State of local

agency.

U.S. CONSTITUTION AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

U.S. CONSTITUTION AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FILED
DEC 11 1995

No. 95-511

In the Supreme Court of the United States

OCTOBER TERM, 1995

LISA B. WILLIAMS, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's "principal employment [was] in connection with an activity financed in whole or part by loans or grants made by the United States or a Federal agency" within the meaning of the Hatch Act, 5 U.S.C. 1501(4).

2. Whether the application to petitioner of the Hatch Act's prohibition on seeking partisan political office violates her constitutional rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	7, 11
Brown, In re, 3 Political Action Rep. 273 (Civil Serv. Comm'n 1974)	5, 9, 10
Delta Air Lines v. *August*, 450 U.S. 346 (1981)	13
Oklahoma v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947)	11-12, 13
Pickering v. *Board of Education*, 391 U.S. 563 (1968)	12
Rust v. *Sullivan*, 500 U.S. 173 (1991)	12
Rutan v. *Republican Party of Illinois*, 497 U.S. 62 (1990)	12
Solorio v. *United States*, 483 U.S. 435 (1987)	13
South Dakota v. *Dole*, 483 U.S. 203 (1987)	13
Special Counsel v. *Gallagher*, 44 M.S.P.R. 57 (1990)	5, 8
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947)	9, 11
United States Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)	7, 11
United States v. *Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993)	12
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952)	13
United States v. *Lopez*, 115 S. Ct. 1624 (1995)	13
United States v. *National Treasury Employees Union*, 115 S. Ct. 1003 (1995)	11

Cases—Continued: Page

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 12
Williams v. *MSPB*, 15 F.3d 46 (4th Cir. 1994) 7
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 13
Youakim v. *Miller*, 425 U.S. 231 (1976) 13

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 13
Amend. I 7, 11
Amend. V (Due Process Clause) 11
Amend. X 11, 12
Hatch Political Activity Act, 5 U.S.C. 1501 *et seq.* 3, 4, 6, 7, 8, 9, 10, 11, 12
5 U.S.C. 1501(4) 2, 8, 9, 10
5 U.S.C. 1501(4)(A) 9
5 U.S.C. 1502-1503 8
5 U.S.C. 1502(a) 9
5 U.S.C. 1502(a)(3) 2
5 U.S.C. 1504 3
5 U.S.C. 1504-1505 8
5 U.S.C. 1504-1506 2
5 U.S.C. 1505 4
5 U.S.C. 7323(a)(3) 9
18 U.S.C. 595 10

Miscellaneous:

S. Rep. No. 1236, 76th Cong., 3d Sess. (1940) 10

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-511

LISA B. WILLIAMS, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 55 F.3d 917. The opinion of the district court (Pet. App. A32-A42) is unreported. The opinion of the Merit Systems Protection Board (Pet. App. A27-A31) is reported at 56 M.S.P.R. 277. The opinion of the administrative law judge (Pet. App. A13-A26) is unreported.

JURISDICTION

The judgment of the court of appeals was originally entered on May 3, 1995. The court's opinion was amended on June 9, 1995. A petition for rehearing was denied on June 29, 1995. Pet. App. A45-A46. The petition for a writ of certiorari was filed on September 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Hatch Political Activity Act (Hatch Act) prohibits any covered state government employee from being a candidate for elective office. 5 U.S.C. 1502(a)(3). A state employee is generally covered by the Act if the employee's "principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4). If the Merit Systems Protection Board (MSPB), which is responsible for enforcing the Act, determines that a state employee violated the Act in a manner that warrants dismissal, the government employer may either dismiss the employee and not rehire her for 18 months, or it may forgo an amount of otherwise available federal funds equal to two years' pay at the rate the employee was receiving at the time of the violation. 5 U.S.C. 1504-1506.

1. Between 1987 and 1994, petitioner was employed by the State of Maryland as Executive Assistant to the Director of the Governor's Office of Individuals with Disabilities (OID). Pet. App. A2-A3. The official "position description" for that job indicates that the Executive Assistant is to "assist the Director in the administration and management" of the Office. *Id.* at A8, A20-A21. OID administers several subsidiary

programs, including two that are federally funded: the Technology Assistance Program (TAP) and the Developmental Disabilities Counsel (DDC). Pet. App. A17. Both TAP and DDC are "under personnel and managerial control of OID," and OID is "directly responsible for [the] proper administration of federal grant awards" to the two programs. *Ibid.*; see *id.* at A22-A23.

While petitioner was employed at OID, DDC's time sheets, bills, federal invoices, and other financial matters were channelled through OID, where they were consolidated and approved by the Director before being forwarded to the state Financial Administration Office for payment. Pet. App. A3, A17. OID was also responsible, under federal law, for approving DDC's financial status reports. *Id.* at A17. Petitioner was authorized, in the Director's absence, to sign those reports, as well as invoices, grant payment request forms, and time and attendance reports, in each case certifying or approving the expenditure of federal funds. *Id.* at A3, A23. She did so on several occasions. *Ibid.*

In 1990, petitioner entered a primary election seeking the Democratic Party's nomination for a seat in the Maryland House of Delegates. Pet. App. A3, A16. The United States Office of Special Counsel (OSC), which commences administrative enforcement actions before the MSPB under the Hatch Act, see 5 U.S.C. 1504, sent petitioner three letters informing her that she was subject to the Hatch Act, that her candidacy violated the Act, and that the violation could result in her dismissal from employment. Pet. App. A3. Disagreeing with OSC's interpretation of the Act, petitioner continued her election effort, which was ultimately unsuccessful. *Ibid.*

In 1992, OSC charged petitioner with violating the Hatch Act. Pet. App. A3. An administrative law judge (ALJ) of the MSPB held that petitioner was subject to the Act's prohibitions, in part because her job description "demonstrate[d] that she simply could not perform her duties as Executive Assistant without in some way coming into direct contact with federally-funded activities." *Id.* at A22. The ALJ also relied on the fact that petitioner assisted the Director (and acted in the Director's absence) in exercising "administrative direction and control" over two federally funded programs, including signing financial reports and authorizations for the payment of federal funds. *Id.* at A22-A23.

The ALJ accordingly determined that "as a normal and foreseeable incident to her principal job [petitioner] perform[ed] duties in connection with federally-financed activities" (Pet. App. A23), and that those duties were more than "merely casual or accidental" (*id.* at A24). Because petitioner's violation of the Hatch Act was "serious, conspicuous and at odds with written warnings given by the very agency which oversees" the Act, the ALJ concluded that it was "of such scope and effect as to warrant removal" from employment. *Id.* at A25-A26. The MSPB adopted the ALJ's decision, found that her removal from her position would be warranted under 5 U.S.C. 1505, and ordered either that petitioner be removed from her position, or that OID forfeit receipt of federal funds in an amount equal to two years of her pay. Pet. App. A27-A31 & n.5.

2. The district court reversed the MSPB's decision. Pet. App. A32-A44. The court rejected the MSPB's interpretation of the Act's coverage in this case as overbroad. *Id.* at A35-A38. The court con-

strued the statute (and the MSPB's prior cases) "to include as 'covered employees' [only] those whose duties have a connection with the use of federal funds by virtue of the employee's discretionary or supervisory authority and not by virtue of nondiscretionary ministerial actions or duties." *Id.* at A39. Applying that interpretation, the court concluded that petitioner "neither had no[r] exercised any discretionary or supervisory authority in connection with the use of federal funds." *Id.* at A40. Moreover, the court held that, even if it could find that petitioner had possessed some discretionary authority with respect to the invoices and other financial documents she signed, the exercise of such discretion "was not a normal and foreseeable incident of her job as required by" previous MSPB cases. *Id.* at A40-A41. Rather, the "*de minimis* nature and irregularity" of petitioner's responsibilities with respect to federal funds was "not sufficient to warrant the conclusion that [petitioner] was a 'covered employee' under the Act." *Id.* at A41.

3. The court of appeals reversed, reinstating the MSPB's decision. Pet. App. A1-A12. The court accepted the MSPB's general interpretation that a state employee "is subject to the Hatch Act if, as a normal and foreseeable incident to [her] principal position or job, [she] performs duties in connection with an activity financed in whole or in part by federal funds" (*id.* at A5, quoting *Special Counsel* v. *Gallagher*, 44 M.S.P.R. 57, 61 (1990)), so long as the employee's connection with federally funded activities is not " 'merely a casual or accidental occurrence' of employment" (Pet. App. A5, quoting *In re Brown*, 3 Political Action Rep. 273, 300 (Civil Serv. Comm'n 1974)). The court concluded that "[t]he district court

went beyond the plain language of the Act, and the decisions interpreting that language, when it determined that the actual exercise of supervisory or discretionary control over federally-funded activity was the requisite connection necessary for [petitioner] to be subject to the Act." Pet. App. A7.

The court of appeals emphasized that the district court's "narrow interpretation of the scope of the Hatch Act has not been expressed in any published decision nor has it been adopted by the MSPB, the agency charged with enforcement of the Act." Pet. App. A7. With regard to the district court's reliance on prior cases that had involved more direct supervisory responsibility over federally funded activities, the court pointed out that "Hatch Act cases are fact specific[,] and the mere fact that several state employees found in violation of the Act also held or exercised such discretionary authority does not indicate that the exercise of discretionary authority is a necessary requirement to being covered under the Act." *Id.* at A7-A8.

Applying its interpretation of the Act, the court agreed with the MSPB that petitioner was employed "in connection with" federally funded activities. Pet. App. A8. The court noted that there was "no dispute that OID administered federal funds through its oversight of DDC," and it held that petitioner's "duties in connection with the federally-funded activities of the DDC were normal and foreseeable incidents to her job as Executive Assistant to the Director of OID." *Ibid.* In particular, "it was foreseeable that [petitioner's] normal job duties included authorizing DDC expenditures in the Director's absence." *Ibid.* Thus, although "most of [petitioner's] duties at OID were apart from federally-

funded activities," the court held that petitioner's periodic personal approval of "numerous DDC invoices, expense accounts, and grant payment requests" was sufficient to support the MSPB's conclusion that petitioner was subject to the Hatch Act. *Id.* at A8-A9.

The court of appeals rejected petitioner's argument that application of the Hatch Act to her partisan political candidacy violated her rights under the First Amendment. Pet. App. A9 n.7. Relying on its prior decision vacating a stay entered by the district court to prevent petitioner's removal from office pending appeal, the court noted that "[t]he Supreme Court has consistently found that the Hatch Act is constitutional and does not violate the First Amendment." *Ibid.* (quoting *Williams* v. *MSPB*, 15 F.3d 46 (4th Cir. 1994), and citing *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), and *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)).

Finally, the court of appeals affirmed the MSPB's determination that removal from employment was an appropriate sanction for petitioner's Hatch Act violation. Pet. App. A9-A12. The court noted that "Congress has determined that the only penalty for violation of § 1502 of the Hatch Act is removal" (or a prescribed forfeiture of federal funds by the state employer), but that the MSPB has the discretion to determine whether to impose removal, or no penalty at all. *Id.* at A10. After reviewing the MSPB's conclusions that petitioner's partisan candidacy was a serious violation of the Act, knowingly undertaken in the face of repeated warnings that it would contravene the Act's prohibitions, the court concluded that the MSPB's decision to order petitioner's

removal was "in accordance with law, and [that] the [MSPB] did not abuse its discretion in reaching that decision based on a careful weighing of the mitigating and aggravating factors" involved in petitioner's case. *Id.* at A11-A12. The court accordingly remanded the case to the district court for the entry of an order affirming the MSPB's decision in all respects. *Id.* at A12.

ARGUMENT

The court of appeals correctly upheld the MSPB's reasonable construction of the Hatch Act, which does not conflict with any decision of this Court or of any court of appeals. There is no reason for this Court to review either that decision or the MSPB's application of the Act to the specific facts of petitioner's case.

1. The Hatch Act restricts the partisan political activities of any "individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." 5 U.S.C. 1501(4); see 5 U.S.C. 1502-1503. Congress has entrusted the enforcement of those restrictions to the MSPB. 5 U.S.C. 1504-1505. As the court of appeals recognized (Pet. App. A5-A6), the MSPB has interpreted the Act to apply to any state employee who, "as a normal and foreseeable incident to [the employee's] principal position or job," performs duties "in connection with" any federally financed activity. *Special Counsel* v. *Gallagher*, 44 M.S.P.R. 57, 61 (1990). That interpretation is reasonable and consistent with the plain language of the Act, and the court of appeals properly sustained it.

Petitioner argues (Pet. 5-8) that the MSPB's interpretation of the Act is overbroad, evidently because the MSPB made no finding that her partisan activities "had an adverse effect on the proper administration of [federal] funds" (Pet. 6). The Act's proscriptions, however, are broad and prophylactic: nothing in the Act requires any showing of an actual adverse effect in a particular case. See 5 U.S.C. 1502(a). Moreover, as the court of appeals recognized (Pet. App. A7), nothing in the Act (or in the cases applying it) supports the district court's proposed limitation of coverage to state employees whose jobs require them to exercise "discretionary or supervisory authority" over federally funded activities (*id.* at A39). Indeed, the similar prohibition on partisan political campaigns by most federal government employees applies regardless of whether a particular employee's job involves the exercise of any discretion. 5 U.S.C. 7323(a)(3); see *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100-101 (1947). There is no indication that Congress intended to impose a different standard on state officials employed "in connection with" federally funded activities. 5 U.S.C. 1501(4).

The "in connection with" standard itself imposes some limitation on the Act's coverage of state (as opposed to federal) employees. As the court of appeals recognized (Pet. App. A5-A6), the employee's connection to federally funded activities must be more than "merely a casual or accidental occurrence" of employment. *In re Brown*, 3 Political Action Rep. 273, 300 (Civil Serv. Comm'n 1974); see also 5 U.S.C. 1501(4)(A) (excepting from coverage any state employee who "exercises no functions in connection with" the federally funded activity). But where a

"normal and foreseeable," rather than "casual or accidental," connection exists, the Act's prohibition on partisan political campaigns is absolute, applying as much to the file clerk in a federally funded project as to the state officer who manages the project and oversees the disbursement of its funds.*

In this Court, petitioner does not contest the court of appeals' conclusion (Pet. App. A8-A9) that her functions with respect to federally funded activities were "normal and foreseeable incidents to her job as Executive Assistant to the Director of OID," a state agency with "administrative direction and control" (*id.* at A23) over two federally funded programs. Even if petitioner did not, by virtue of her position, exercise "discretionary authority" over those programs (*id.* at A40), her duties "in connection with" them (5 U.S.C. 1501(4)) were more than "merely a casual or accidental" incident of her employment. *In re Brown*, 3 Political Action Rep. at 300; see Pet. App. A5, A8-A9. The court of appeals therefore correctly held (*id.* at A9) that the evidence in this case was sufficient to support the MSPB's determination that petitioner was subject to the restrictions of the Act. Petitioner

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* In contrast, the federal criminal prohibition against the use of official authority to interfere with or affect campaigns for the Presidency or for certain other federal offices, 18 U.S.C. 595, applies only to federal or state officials "employed in any *administrative position* * * * in connection with" any federally financed activity (emphasis added). The legislative history confirms the distinction, treating the two provisions separately and describing the broader provision at issue here as applying to "any officer or employee of any State or local agency, who exercises *any function* in connection with" a federally financed activity. S. Rep. No. 1236, 76th Cong., 3d Sess. 3 (1940) (emphasis added).

identifies no decision of this Court or of any court of appeals that suggests a different legal standard or result.

2. Petitioner contends (Pet. 8-11) that application of the Hatch Act's partisan political campaign restrictions to her violates her rights under the First or Tenth Amendments or the equal protection component of the Fifth Amendment's Due Process Clause.

As the court of appeals observed (Pet. App. A9 n.7), this Court has repeatedly found that the Hatch Act's general prophylactic limitations on partisan political activity by federal employees do not violate the First Amendment. *United Public Workers* v. *Mitchell*, 330 U.S. at 100-101; *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 554-556 (1973); see also *Broadrick* v. *Oklahoma*, 413 U.S. 601, 606-608, 616-618 (1973) (sustaining similar state law restrictions on state employees). The Court has made clear that the permissible legislative motivations for limiting the political activity of public employees extend beyond ensuring impartial decision-making by those exercising supervisory or discretionary authority. They include ensuring that government employees will not be used to build a political "machine," and that their employment and advancement will not be based on their political activity. *Mitchell*, 330 U.S. at 101; *Letter Carriers*, 413 U.S. at 564-567; see also *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1015 (1995).

This Court has also approved the extension of the Hatch Act's restrictions to state officials employed in connection with federally funded programs. *Oklahoma* v. *United States Civil Serv. Comm'n*, 330

U.S. 127, 142-143 (1947). Petitioner suggests no persuasive reason for this Court to revisit that issue, or to require case-by-case balancing of each employee's interest in political participation against the governmental interests supporting the Hatch Act's limitations. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705-2706 (1993) ("validity of the regulation [under the First Amendment] depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case") (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 801 (1989)); compare *Letter Carriers*, 413 U.S. at 564-567 (sustaining Hatch Act's content-neutral and non-discriminatory prohibi-tions) with, *e.g.*, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 71-79 (1990), and *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968) (generally prohibiting adverse government employment actions based on an employee's views or political affiliations). If the federal government may restrict the partisan political activities of its own employees, it may also restrict such activities by state government employees involved with the administration and disbursement of federal funds. See *Oklahoma*, 330 U.S. at 143; cf. *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991).

Petitioner's allusion to the Tenth Amendment (Pet. 10) is equally unavailing. This Court has previously upheld the limitations at issue here against a State's Tenth Amendment challenge. In *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. at 143, the Court made clear that, "[w]hile the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it

does have power to fix the terms upon which its money allotments to states shall be disbursed." See also *id.* at 144 ("The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual."); *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). Nothing in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), which involved the limits of Congress's power under the Commerce Clause, suggests any different result in this case.

Finally, petitioner argues (Pet. 10-11) that asserted differences in the sanctions available to the MSPB against state and federal employees who violate the prohibition against partisan campaigning are unconstitutionally irrational. Petitioner did not make any such argument below, and neither the MSPB nor the court of appeals considered or passed upon it. The argument has therefore been waived. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Petitioner has given no reason for ~~their~~ failure to raise this claim at an earlier stage of this litigation, and she has identified no exceptional circumstances warranting this Court's review of a question not raised or decided below (or, so far as we are aware, in any other court). Compare *Youakim* v. *Miller*, 425 U.S. 231, 234-236 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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